IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 34

TIMES FILM CORPORATION,

Petitioner,

v.

CITY OF CHICAGO, RICHARD J. DALEY and TIMOTHY J. O'CONNOR,

Respondents.

PETITION FOR REHEARING

It would appear from reading the majority opinion that the Court has decided a question other than the one which Petitioner sought to bring before this Court. For this reason, Petitioner respectfully requests a rehearing.

Petitioner has never contended that it is entitled to show, even once, "pornography, incitement to riot or forceful overthrow of orderly government." Nor has it claimed "complete and absolute freedom to exhibit at least once any and every kind of motion picture." In our Petition for Certiorari, we stated the question as whether those provisions of the Chicago licensing ordinance which provide for censorship of *all* motion pictures prior to their exhibition are unconstitutional under the First and Fourteenth Amendments. It was

so stated in our Brief on the merits. During oral argument the following colloquy took place.

"Justice Whittaker: That would be to say then, if I understand you, that never could pornography or obscenity be enjoined, its publications and distribution.

Mr. Bilgrey: That is not what I conceive this question to be, Justice Whittaker. I don't think this to be the question, Justice Whittaker. I don't think that the question before this Court is that even if we were to concede that this motion picture is obscene, whether we would have the right to initially show it. I think that is a completely different question which, I don't know if it has ever been decided or come out in that precise posture."

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"Justice Whittaker: I am asking you if by this very suit you are not asking the City to issue a license to show the film, whether or not it is obscene.

Mr. Mikva: Whether or not it is obscene because there is no reason to assume that it is obscene.

Justice Whittaker: Well, is there a reason to assume that it is not?

Mr. Mikva: No, and, therefore, it is the same thing as a printing press or any other form of communication. You make no assumption about it. It is up to the City and the State to come forward with pretty convincing proof that this falls within one of the exceptional areas.

Justice Frankfurter: Are you now saying that what all this ruckus is about is the presumption

that your film does not offend the restriction of the ordinance, and that if any such assumption, any such factor, enters into the situation, then the Police Commissioner should say, 'We have very good grounds for believing that this is a dirty film, and show it to us?'

Do you think that then they are entitled to see it?

Mr. Mikva: That would be a different case, Your Honor. I do not know whether I would say he would be entitled to see it, but is not this case.

Justice Frankfurter: I would think the Court would say instead of indulging in presumptions one way or the other, 'Why don't you show it.'

Mr. Mikva: Let me get to the reasons why we won't show it, Your Honor, and that really is the other part of this defense that the court below has put up.

* * * *

Justice Frankfurter: You say it would be a different case if the Police Commissioner said, 'The fact of the matter is I have had a private showing of this film and, on the basis of that, I think I want to see the film.' You think that would be a different case?

Mr. Mikva: I do not think that it would be this case. I know it would—I do not know if it would be decided the same as this case or not. . . ."

* * * *

"Mr. Mikva: Your Honor, in *Kingsley Books,* which is the furthest this Court has gone, the Court relied on a specific finding, indeed, I think an admission of pornography to justify the ex-

traordinary interference with freedom of speech. We say there must be something comparable to that.

I would like to hope, Your Honor, that it would be at the very least that requirement. But we are saying that, at least, there must be something comparable to that requirement met in a case before the interference can be justified.

Just at what point the Court is going to draw that line is a hard question for me to answer, your Honor. As I say, I hope it would not go beyond the point that was drawn in *Kingsley Books,* but certainly even in that case, which drew the line further than it had ever been drawn before, there was a firm and positive finding by the Court that the matter was obscene."

We respectfully submit that the difference between the question presented and the question decided is more than trivial. In every case before and since *Near* v. *Minnesota,* 283 U.S. 697 (1931), this Court has discussed possible situations in which the claimed First Amendment privilege might have to give away to the necessities of the public welfare. In all of those distinctions, the limitation of free speech has been stated as being recognizable "only in *exceptional* cases."

Thus, in *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957), the Court upheld New York injunctive power against *obscene* books. There was a specific finding of obscenity by the lower court. Accordingly, it came within one of the "exceptions" to the First Amendment privilege against prior restraint.

Petitioner's entire argument is based on the simple premise that motion pictures as a whole are not one of the exceptions to free speech, and this Court has agreed in many previous decisions. If this is so, then the city or the state must come forward with *something* in addition to the fact that the communication is on celluloid before it can interfere with its expression. What that "something" should be was *not* the question presented by this case. Both sides conceded that the city came forward with *nothing* in this case other than that the communication was a motion picture. Petitioner is prohibited from showing the motion picture, not because it is obscene or falls within any other of the exceptional cases, but because it is an unsubmitted motion picture. This is the question presented by this case.

Indeed, as the colloquy between Justice Frankfurter and counsel for Petitioner, quoted above, indicates, even a "suspicion" on the part of the Police Superintendent presents a different question than the question presented by this case.

Accordingly, the majority decision, in light of the Record, and the question actually presented stands for the proposition that government may now impose a prior restraint on every kind of motion picture communication in order to insure a prohibition on the exceptional forms. Since the Court even in the instant case does not distinguish between motion pictures and other forms of communication in this important aspect, the consequences are indeed far reaching.

The Court further attributes to the Petitioner the position that the sole remedy available to the city or state is the "invocation of criminal processes under the Illinois pornography statute and then only after transgression." *This was not and is not Petitioner's position.* Indeed, the other cities in Illinois have undertaken different procedures which have been given judicial approval. Thus, in *Aurora* v. *Warner Brothers Pictures Distributing Corporation,* 16 Ill. App. 2d 273, 147 N.E. 2d 694 (1958), the Illinois courts granted an injunction to the City of Aurora to restrain the exhibition of an allegedly obscene film. The City of Aurora does not have a "prior submission" ordinance such as the one in question here. We do not know what other remedies in addition to the *Kingsley Book* procedure and the *Aurora* procedure could be developed by the city or state. It is clear, however, that the sustaining of our position does not leave the city open to violent attacks of pornography and the like. The 46 states and hundreds of cities that exist without a prior submission ordinance are proof of that fact.

In any event, Petitioner has never argued that all remedies other than the criminal statute would fail to meet the constitutional test. Our oral argument was on the question presented—that *this* ordinance cannot pass constitutional muster.

For the above reasons, Petitioner respectfully requests that the Petition for Rehearing be granted, that the case be restored to the docket, and that Petitioner be granted permission to file briefs and to reargue, so that the Court may consider the question as to whether the city may impose a ban on a motion

picture simply because it is a motion picture without any proof that the motion picture falls within one of the exceptional cases. The effects of this Court's decision are so far reaching that it ought to be made crystal clear that the decision rests on the question presented by this case and not a hypothetical substitute.

An extension of time was granted for the filing of this Petition by the Honorable Mr. Justice Clark up to and including the 27th day of February, 1961.

Dated, February 24, 1961.

Respectfully submitted,

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Certificate of Counsel

We, FELIX J. BILGREY and ABNER J. MIKVA, counsel for the above named petitioner, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay.

Dated, February 24, 1961

FELIX J. BILGREY
ABNER J. MIKVA